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MEMORANDUM

August 1, 2013

To: Tribal Health Clients
From: Hobbs, Straus, Dean & Walker LLP
Re: *CMS Final Rule adopting standards for Navigator and Certified Application Counselor Programs for Federally-Facilitated Exchanges*

On July 17, 2013, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, (HHS), published a Final Rule adopting standards for Navigators and Certified Application Counselors for Federally-facilitated Exchanges, including State Partnership Exchanges, and requiring that all Exchanges operate a certified application counselor program. 78 Fed. Reg. 42824 (July 17, 2013).

The Affordable Care Act (ACA) requires that Exchanges award grants to “Navigators” to perform certain consumer assistance functions. As noted by CMS in the preamble to the final rule, tribes are eligible to become Navigator entities. However, Navigators are required to meet certain standards set by the Exchange. The July 17 Final Rule, which adopts these standards for entities and individuals serving as Navigators in Federally-facilitated Exchanges, largely finalizes the proposed standards, which we described in our memorandum to Tribal Health Clients dated April 10, 2013. The requirements largely relate to training and certification, conflict of interest, and accessibility. States may also adopt the standards in the Final Rule, but may choose to design their own standards instead.

Under separate authority in the ACA, the Final Rule also establishes a “certified application counselor” program, which must be carried out by every Exchange. Certified application counselors are intended to provide consumers with information about QHP options and insurance affordability programs, such as Medicaid and CHIP, for which they may be eligible and to assist in the application and enrollment process. Notably, Exchanges are not required or expected to fund certified application assistance counselors. Designated organizations and certified application counselors are also prohibited from charging applicants for the assistance provided.

Like Navigators, certified application counselors must meet certain standards set forth in the Final Rule, though the standards are not as onerous because certified application counselors will provide fewer services. The standards applicable to certified application counselors under the Final Rule include, among others: completing Exchange approved training and certification, agreeing to comply with privacy and security standards, and agreeing to act “in the best interest” of the applicant assisted. Unlike

individuals serving in the Navigator program, certified application counselors must disclose conflicts of interest but will not be prohibited from participating as a certified application counselor due to the conflict.

In the preamble to the final rule, CMS responded to specific comments relating to the participation of Indian health providers as Navigators or designated organizations for the certified application counselors program. Specifically, CMS noted that Indian health care providers who choose to participate in the Navigator or certified application counselor programs will be subject to non-discrimination requirements, including but not limited to Title VI of the Civil Rights Act of 1964. However, CMS also noted that under the Final Rule Navigators and certified application counselors who “lack capacity” to serve a particular individual may meet program requirements by referring that individual to other Navigators or counselors, or to other Exchange resources. CMS further noted that “Indian health providers also have specific independent authority under section 404 of the Indian Health Care Improvement Act to assist AI/ANs in enrolling in health benefits coverage,” and that nothing in the Final Rule requires Indian health providers to become Navigators or certified application counselors in order to continue any current services they provide. Finally, CMS intends to make the certified application training available to the public. Accordingly, Indian health programs currently providing enrollment assistance may take advantage of the training without becoming certified, as long as they do not present themselves as certified application counselors.

The Intergovernmental and External Affairs office at the Department of Health and Human Services recently announced that applications are now available for organizations who are interested in becoming a Certified Application Counselor (“CAC”) organization (available online at: <http://marketplace.cms.gov/help-us/cac.html>). In addition, three webinar sessions have been scheduled to cover several “foundational” training topics, including: the requirements for becoming a CAC organization; how to apply; an overview of the training requirements; Marketplace eligibility and enrollment; Medicaid expansion; and the streamlined application process. Webinars will be held on August 5, and August 7, 2013.

Please let us know if you would like assistance or have further questions about the implications of this Final Rule for your health program. For more information, please contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstrauss.com; Geoff Strommer at (503)242-1745 or gstrommer@hobbsstrauss.com; or Caroline Mayhew at (202)822-8282 or cmayhew@hobbsstrauss.com.